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THE attention of the profession has, of late, been directed to the subject of reform in the jury system, and discussions upon that theme have been a prominent feature at recent bar association meetings. The revival of the agitation upon the subject was doubtless prompted by the outcry against the Cronin trial and verdict. There is considerable to be said upon both sides of this question, and while the argument against a unanimous verdict seems to us to be practically sound, yet it will often happen, as it has often happened, that unanimity on the part of twelve men is the best assurance of a proper verdict. Indeed, the very case which has been made the text of the agitation on the subject, and which has been held up as an illustration of the evil of the old system, in our view, furnishes to the friends of that system the best possible argument in its favor. For the Cronin verdict, which was confessedly a compromise one, was, in our opinion, fair and just, and in that case, at least, the "single obstinate juror," no matter what his motives, secured a proper verdict. It would, we think, have been shameful to have hung the defendants in that case upon testimony, which was entirely circumstantial and not of the strongest character. Yet it is undoubtedly true that the requirement of a unanimous verdict makes legal travesties of many criminal trials; in a great number of cases absolutely preventing a verdict, and in many others bringing one which does not represent the sincere and honest conviction of a single one of the panel.

AT the last meeting of the New York State Bar Association a suggestion was made upon this subject by Austin Abbott, Esq., which is, at least, of novel interest. He proposes to destroy the power of a single juror to prevent a verdict by "hanging the jury," by a provision that the court or officer before whom a jury trial in any civil action or special proceeding is had, instead of discharging the jury when they disagree, may, and if either party request it, must inquire how many of the jurors are agreed; and if all but one are agreed, he shall take their vedict and request the dissenting juror to state the ground of his dissent, which statement, if made, shall be entered on the record, with the verdict of the majority, and the jurors shall then be discharged. And if no ground sufficient to sustain a verdict the other way has thus been stated and recorded, the verdict of the majority shall, upon motion of either party, stand as the verdict in the cause, and the proceedings thereon shall be the same as if the jurors had been all agreed. This practically puts it into the power of the trial judge to declare the verdict upon the recommendation of eleven men. If a unaminous verdict is still to be retained as the general rule, such a provision as this would be wholesome both in rendering jurors more reasonable in their deliberation, and in putting it out of the power of a corrupt or interested juror to defeat the trial.

THE recent decision by the United States Supreme Court, of what is known as the "Minnesota Granger Cases," is of great interest as being the first direct declaration of that court in favor of the principle that railroads cannot be compelled by State legislation to accept compensation for services, fixed by the State, without reference to whether such compensation is reasonable or otherwise; or, in other words, that the States have no authority to compel carriers to haul freight at a loss or for less than a fair compensation. This doctrine is undoubtedly sound and is in harmony with the decision of the Florida Supreme Court in State v. Pensacola & Atl. R. R. Co., and with the doctrine announced by Chief Justice Waite as early as 1886 that the power to regulate is not a power to destroy. It is also in line with the decision of Judge Brewer in the Iowa case, involving the same question. Though in that case he refused an injunction against the Iowa commissioners to prevent them from establishing and enforcing ruinous rates for traffic, he did so upon the ground that the unreasonableness of the rates had not then been demonstrated by experience.

In the Minnesota case just decided the United States Supreme Court divided, and

Justices Bradley, Lamar, and Gray dissented from the opinion of the majority and Miller gave a qualified assent. The dissenting justices took the ground that transportation companies are mere agencies selected to perform a function which really belongs to the State itself—viz: To supply highways or lines of travel and traffic between different parts of its territory. In this view the railroad is a mere creature of the State, and the legislature has the same right to dictate its charges as to fix the rates of toll on a turnpike. The authority of the State is declared so absolute that it can make rates high enough to be remunerative or not, as it sees fit, and might drive a railroad into bankruptcy and destroy the value of its property, while the courts would be powerless to interfere. The carrier could obtain only such relief as the legislature might see fit to grant. The decision of the court supports fully the doctrine that railroad commissioners can fix rates and the carriers must obey them until they are prepared to show that the charge is unremunerative. It does not impair the power of a State to secure fair and reasonable rates, but merely denies that it can compel a railroad to carry freight at less than cost or without profit. The decision is eminently just whether looked at from the standpoint of the carrier or the shipper.

NOTES OF RECENT DECISIONS.

THE question, which has arisen for the first time in this country, and which is simply of historical interest, as to where the fee is in confiscated real estate during the lifetime of a person whose property was confiscated and who has been pardoned, came before the Supreme Court of the United States, in Illinois Central Railroad Co. v. Bosworth, 10 S. C. Rep. 231. It was there declared that where the property of a person has been confiscated and sold on the ground of treason and rebellion, the removal of his disabilities by pardon or amnesty revests in him the power of disposition over the reversion of such property, expectant upon the termination of the confiscated estate, it having been in suspension during his disability. Mr. Justice Bradley says:

"The principle question raised in the present case is whether, by the effect of a pardon and amnesty granted to A. W. Bosworth by the special pardon of October, 1865, and the general proclamation of amnesty and pardon of December 25, 1868, he was restored to the control and power of disposition over the fee-simple or naked property in reversion expectant upon the termination of the confiscated estate in the property in dispute. The question of the effect of pardon and amnesty on the destination of the remaining estate of the offender, still outstanding after a confiscation of the property during his natural life, has never been settled by this court. That the guilty party had no control over it, in the absence of such pardon or amnesty, has been frequently decided. Wallach v. Van Riswick, 92 U. S. 202; Chaffraix v. Shiff, *Id.* 214; Pike v. Wassell, 94 U. S. 711; French v. Wade, 102, U. S. 132; and see Avegno v. Schmidt, 113 U. S. 293, 5 Sup. Ct. Rep. 487; Shields v. Schiff, 124 U. S. 351, 8 Sup. Ct. Rep. 510. But it has been regarded as a doubtful question what became of the fee, or ultimate estate, after the confiscation for life. "We, are not, therefore, called upon," said Justice Strong, in Wallach v. Van Riswick, "to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the offender." 92 U. S. 212. It has also been suggested that the fee remained in the person whose estate was confiscated, but without any power in him to dispose of or control it.

Perhaps it is not of much consequence which of these theories, if either of them, is the true one; the important point being that the remnant of the estate, whatever its nature, and wherever it went, was never beneficially disposed of, but remained (so to speak) in a state of suspended animation. Both the common and civil laws furnish analogies of suspended ownership of estates which may help us to a proper conception of that now under consideration. Blackstone says: "Sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance, and contemplation in law, there being no person *in esse* in whom it can vest and abide, though the law considers it as always potentially existing, and ready to vest whenever a property owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis;* it remains, therefore, in waiting or abeyance during the life of Richard." 2 Bl. Comm. 107. In the civil law, the legal conception is a little different. Pothier says: "The dominion of property (or ownership), the same as all other rights, as well *in re* as *ad rem*, necessarily supposes a person in whom the right subsists and to whom it belongs. It need not be a natural person; it may belong to corporations or communities, which have only a civil and intellectual existence or personality. When an owner dies, and no one will accept the succession, this dormant succession (*succession jacente*) is considered as being a civil person, and as the continuation of that of the deceased; and in this fictitious person subsists the dominion or ownership of whatever belonged to the deceased, the same as all other active and passive rights of the deceased; *hæreditas jacens personæ defuncti locum obtinet.*" Droit de Domanie de Protriete, cc. 1, 15.

But, as already intimated, it is not necessary to be overcurious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated, nor confiscated, nor appropriated to any

third party. The owner, as a punishment for his offenses, was disabled from exercising any acts of ownership over it, and no power to exercise such acts was given to any other person. At his death, if not before, the period of suspension comes to an end, and the estate revives and devolves to his heirs at law. In Avegno v. Schmidt, 113 U. S. 293, 5 Sup. Ct. Rep. 487, and in Shields v. Schiff, 124 U. S. 351, 8 Sup. Ct. Rep. 510, this court held that the heirs of the offender, at his death, take by descent from him, and not by gift or grant from the government. They are not named in the confiscation act, it is true, nor in the joint resolution limiting its operation. The latter merely says: "Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender, beyond his natural life." The court has construed the effect of this language to be to leave the property free to descend to the heirs of the guilty party. Bigelow v. Forrest, 9 Wall. 339; Wallach v. Van Riswick, 92 U. S. 202, 210. Mr. Justice Strong, in the latter case, speaking of the constitutional provision that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted, (which provision was the ground and cause for passing the joint resolution referred to,) said: "No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone,—a declaration that the children should not bear the iniquity of the fathers." But although the effect of the law was to hold the estate, or naked ownership, in a state of suspension for the benefit of the heirs, yet they acquired no vested interest in it; for, until the death of the ancestor, there is no heir. During his life it does not appear who the heirs will be. Heirs apparent have, in a special case, been received to intervene for the protection of the property from spoliation. Pike v. Wassell, 94 U. S. 711. This was allowed from the necessity of the case, arising from the fact that the ancestor's disability prevented him from exercising any power over the property for its protection or otherwise, and no other persons but the heirs apparent had even a contingent interest to be protected. It would seem to follow, as a logical consequence from the decision in Avegno v. Schmidt and Shields v. Schiff, that after the confiscation of the property, the naked fee (or the naked ownership, as denominated in the civil law), subject, for the lifetime of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise, how could his heirs take it from him by inheritance? But by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained, as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood. The offender can transmit by descent; his heirs take from him by descent. Why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty,—so removed as to restore to him all his rights, privileges, and immunities, as if he had never offended, except as to these things which have become vested in other persons,—why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment, it does restore him to such control. In the opinion of the court in the case of *Ex parte* Garland, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to-wit: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon the conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation,—it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

The qualification in the last sentence of this extract, that a pardon does not affect vested interests, was exemplified in the case of Semmes v. U. S. 91 U S. 21, where a pardon was held not to interfere with the right of a purchaser of the forfeited estate. The same doctrine had been laid down in the Confiscation Cases, 20 Wall. 92, 112, 113. It was distinctly repeated and explained in Knote v. U. S., 95 U. S. 149.

A QUESTION of warranty in sale of chattels, somewhat out of the usual run, came before the Court of Appeals of New York, in Fairbank Canning Co. v. Metzger, 23 N. E. Rep. 372. It was held that a representation and agreement to sell beef that has not been heated before being killed amount to an express warranty. The right of the buyer to recover damages for breach of such warranty is not waived by his acceptance and sale of a part of the beef. Parker, J., says:

In the absence of a warranty as to quality and a breach, the defendant's claim for damages could not have survived the use of the property; for in such case vendees are bound to rescind the contract, and return, or offer to return, the goods. If they omit to do so, they will be conclusively presumed to have acquiesced in their quality. Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. Rep. 335. Therefore, if the referee was right in holding that there was no warranty as to quality, collateral to the contract of sale, we need not inquire further as the judgment must be affirmed. The referee has found the facts, and this court may properly review his legal conclusion as to whether they amounted to a warranty. "A warrant is an express or implied statement or something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the expressed object of it." 2 Schouler, Pers. Prop. (2d Ed.) § 321. All contracts of sale with warranty, therefore, must contain two independent stipulations: First, an agreement for the transfer of title and possession from the vendor to the vendee; second, a further agreement that the subject of the sale has certain qualities and conditions. It is not necessary that in the collateral agreement the word "warranty" should be used. No particular phraseology is requisite to constitute a warranty. "It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." Society v. Lawrence, 4 Cow. 440. It is not necessary that the vendor should have

intended the representation to constitute a warranty. If the writing contains that which amounts to a warranty the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares. Hawkins v. Pemberton, 51 N. Y. 198. In that case the defendants purchased at auction an article, relying upon the representation of the auctioneer that it was "blue vitriol." It was in fact "Salzburger vitriol," an article much less valuable. In an action brought against the purchaser, the trial court directed a verdict for the plaintiff. This was held to be error because the representation at the sale amounted to a warranty. Judge Earl, in delivering the opinion of the court, after collating and discussing the authorities upon the subject of warranty, said: "The more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty." In Kent v. Friedman, 17 Wkly. Dig. 484. Judge Learned in his opinion says: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." The court of appeals subsequently affirmed the judgment of the general term (101 N. Y. 616, 3 N. E. Rep. 905). In White v. Miller, 71 N. Y. 118, frequently referred to as the "Bristol Cabbage Seed Case," the court say: "The case of Hawkins v. Pemberton, 51 N. Y. 198, adopts, as the law in this State, the doctrine upon this subject now prevailing elsewhere that a sale of a chattel by a particular description is a warranty that the article sold is of a kind specified." So, too, a sale by sample imports a warranty that the quality of the goods shall be equal in every respect to the sample. Brigg v. Hilton, 99 N. Y. 517, 3 N. E. Rep. 51, and cases cited.

Now, in the case before us, the defendants undertook to purchase of the plaintiff fresh dressed beef, to be wholesaled in part, and the residue retailed to their customers. They endeavored to procure good beef. Not only did they contract for beef that was clean, well dressed, in first-class condition in every respect, and merchantable, and that was thoroughly chilled before being loaded on the cars but, further, that they should not be given beef that had been heated before being killed. When, therefore, the plaintiff placed in a suitable car beef well dressed and clean, and of the general description given in defendants' order, it had made a delivery of the merchandise sold, and, by the terms of the contract, was entitled to be paid as soon as the bill should reach defendants, and before the arrival of the beef made an examination by defendants possible. But there was another collateral engagement, and yet forming a part of the contract, which the plaintiff had not performed,—an engagement of much consequence to the defendants and their customers, because it affected the quality of the meat. Upon its performance or non-performance depended whether it should be wholesome as an article of food. It was of such a character that defendants were obliged to rely solely upon the representation of the plaintiff in respect thereto. The plaintiff or its agents selected from their stock the cattle to be slaughtered. No one else knew, or could know, whether they were heated and feverish. Inspection immediately after placing the beef in the car would not determine it. That collateral engagement consisted of a representation and agreement that plaintiff would deliver to the defendants beef from cattle that had not been heated before being slamghtered. Such representation and agreement amounted to an express warranty. The referee found, as a fact, "that the meat had been heated before being killed;" therefore there was a breach of the warranty, and the defendants are entitled to recover their damages by way of counterclaim, unless such right must be deemed to have been subsequently waived.

It is not necessary for the disposition of this case to decide, and therefore it is not decided, whether a warranty is implied, in all cases of a sale of fresh dressed meat, by the party slaughtering the animals, that they were not heated before being killed; and, as some of my associates are averse to any expression whatever upon that question at this time, what is said must be regarded as an individual view, rather than that of the court. My attention has not been called to a decision in this State covering that precise question. It was determined in Divine v. McCormick, 50 Barb. 116, that, in the sale of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of *caveat emptor* shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his customers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case fresh meat is intended for immediate consumption.

The rule is well settled, by the courts of last resort in many of the States, that a vendor of an article, manufactured by him for a particular purpose, impliedly warrants it against all such defects as arise from his unskillfulness either in selecting the materials, or in putting them together and adapting them to the required purpose. See cases cited in 18 Alb. Law J. 324. One who prepares meat for the wholesale market may be said to come within that rule; because he purchases the cattle, determines whether they are healthy and in proper condition for food, and upon his skill in dressing and preparing the meat for transportation a long distance its quality and condition, as an article of diet for the consumer, largely depends. In two of the States at least, it is held that, where perishable goods are sold to be shipped to a distant market, a warranty is implied that they are properly packed and fit for shipment, but not that they will continue sound for any particular or definite period. Mann v. Everston 32 Ind. 355; Leopold v. Van Kirk, 27 Wis. 152.

An interesting question in the law of carriers and the limitations upon their liability, came before the Supreme Court of Tennesee, in Louisville & Nashville Railroad Co. v. Gilbert, 12 S. W. Rep. 1018. There it was held that a railroad company that has made no reduction in its freight rates in consideration of a stipulation in a bill of lading exempting it from loss by fire; that has furnished its agent with no form for a bill of lading not containing the "fire clause;" and that has given him no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the common-law responsibility attaching to the company, is

liable for goods destroyed by fire, though the company's officers testify that the company had two freight rates—one under the restricted liability, the other without—and that, if the shipper had so requested, permission would have been given to ship under a contract without the "fire clause" in it. The stipulation, being unreasonable and unjust, is not a valid limitation of the company's common-law liability as a common carrier. Where the railroad company has given its customers no choice as to whether they would ship with or without the "fire clause," the acquiescence of the shipping public in the form of the bill of lading containing the "fire clause" does not establish the reasonableness of the exemption. Caldwell, J., says:

There is no controversy about the consignment, loss, and value of the cotton; nor is there any denial that the defendant company would be liable for the loss, under the rules of the common law. These are all conceded. But it is insisted in behalf of the company that its common-law liability was limited by special contract, and that special contract is relied upon in bar of any recovery. The bill of lading under which the shipment was to be made is produced in evidence. It contains a fire clause which stipulates that the company shall not be liable for loss or damage by fire. This is the special contract through which exemption from liability is sought. The plaintiffs deny the validity of that stipulation, and thus the issue for our determination is presented.

It is now too well settled to admit of debate that the common-law liability of common carriers may be limited by special contract, even to the extent of denuding them of the character of insurers, except as against their own negligence, or that of their agents and servants; and the limitation may be, and is generally, embraced in the bill of lading delivered to the shippers at the time. It is not every such special contract, however, that is effective. To be valid, it must be fairly obtained, and just and reasonable. Under the English railway and canal traffic act of 1854, (17 & 18 Vict. ch. 31, § 7,) such stipulations are called "conditions," and they can be upheld only when they "shall be adjudged * * * to be just and reasonable." The same criterion is uniformly applied in this country, and no limitations of the carrier's common-law liability, in whatever form made, will afford protection unless just and reasonable in the eyes of the law. Railroad Co. v. Lockwood, 17 Wall. 357; Hart v. Railroad Co. 112 U. S. 338, 5 Sup. Ct. Rep. 151; Marr v. Telegraph Co. 1 Pickle, 542, 3 S. W. Rep. 496; Transportation Co. Bloch, 2 Pickle, 397, 6 S. W. Rep. 881. Though such is the generally accepted test, the use of these words ("just and reasonable") will not always meet the requirements of investigation. What will be just and reasonable in one case may not be so in another. The justness and reasonableness of the condition or limitation must of necessity depend upon the peculiar facts and circumstances of every case,—the nature of the article to be conveyed, the hazard of the transportation, the surroundings of the parties at the time, and the mutual advantages given and received.

Referring to the burden and weight of proof, an eminent British author says: "The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favor of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it." Redman, Law Ry. Carr. (2d Ed.) p. 66, citing Lewis v. Railway Co. 47 Law J. Q. B. 131. In further treating on the same subject, the same writer, on page 71, says: "To enable a company to rely on an alternative contract offered to the customer, it must appear that such alternative was itself reasonable. A company cannot offer the choice of two unreasonable conditions, and then rely on the one actually chosen." Citing Lloyd v. Railway Co. 15 Ir. C. L. 37. To the same effect as the latter quotation is the Marr Case, decided by this court in 1886. There the telegraph company was shown to have had four different rates of charges, with as many different degrees of liability. They were all held to be unreasonable, and the fact that the customer choosing one rate had the option of taking any one of the other three was of no avail to the company, in an action for damages. Marr v. Telegraph Co. 1 Pickle, 545, 3 S. W. Rep. 496. The alternative must be both reasonable and *bona fide*. If either unreasonable or colorable only, it will be unavailing as a defense to the action against a carrier. A company standing before the public as a common carrier, and enjoying the advantages and franchises as such, must be ready to do the business of a common carrier, with the full measure of responsibility imposed by the common law; and it may at the same time offer to do the same business with a limited liability, the limitation resting upon a sufficient consideration. An offer or readiness to transport the goods of its customer with the one or the other degree of responsibility, at his option, is as little as can be required of any common carrier. Less than this does not present a *bona fide* and reasonable alternative. Reduction of freight charges is the usual consideration for the diminution of responsibility on the part of the company. One of the leading principles deducible from the English cases is stated by Mr. Redman in these words: "A condition is reasonable which reduces a company's liability to a minimum, if it is coupled with compensating advantages to the customer (such as cheapness of carriage), and the latter has the alternative of getting rid of the condition by paying a reasonably higher rate." Redman, Law Ry. Carr. p. 75, § 2. This language puts the law clearly, and meets our unqualified approval. It is reproduced as the law of the two countries in a recent American work. 2 Amer. & Eng. Cyclop. Law, 819.

These clauses, similar to the one before us, when based upon a sufficient consideration, have by the Supreme Court of the United States, and by this court, been held to be valid, and to protect the company from liability for loss by fire, caused otherwise than by the negligence of the company or its agents. York Co. v. Railroad Co. 3 Wall. 107; Dillard v. Railroad Co. 2 Lea, 288. In the latter case the court said: "A lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation," 2 Lea, 293. In the former it is broadly intimated that a reduction of charges will be presumed to be the consideration for such a stipulation, the language of the court being: "* * * There is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exemption of losses by fire must nec-

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essarily have affected the compensation demanded." 3 Wall. 113. In speaking of a stipulation for a limited liability in a railroad ticket, the New York court of appeals said: "Like all contracts, to render such an one valid, it is indispensable that it have some consideration, which it would not have if the passenger paid the full fare fixed by law. * * * If the service is reduced, the amount of the reward must be reduced in proportion; and, if the company is relieved from risk, it must make compensation for that relief by the reduction of fare or otherwise." Bissell v. Railroad Co. 25 N. Y. 442. The performance of an act which a party is under a legal obligation to perform does not constitute a good consideration for a promise. Add. Cont. § 4. Hence a mere agreement by a common carrier to transport goods furnishes no consideration for a stipulation for less than common-law liability. Lawson, Carr. § 212.

SPECIAL ASSESSMENT AND SPECIAL TAXATION—NATURE OF

1. General Taxation.
2. Special Assessments.
3. Special Taxation.
   (*a.*) Charitable Institutions.
   (*b.*) Churches.
   (*c.*) Educational Institutions.
   (*d.*) Railroad Property.
   (*e.*) County Buildings.

1. *General Taxation.*—Many corporations have received charters which have provisions exempting their property from taxation. The question has often come before the courts whether taxation as used in these charters included special taxation and special assessments for the purpose of local improvements. General taxation is a burden or charge imposed upon persons or property to raise money for public purposes. Special assessments for city or village improvements are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person has derived from the improvement.[1]

2. *Special Assessments.*—A street is opened in a city, and to pay for the land taken, the damages of the improvements thereon, or adjacent thereto, and injury thereby, and all other expenses, bonds are issued; to pay the same and the interest thereon, an annual percentage is directed to be levied on the lots benefited thereby, which percentage is upon the enhanced value of the lots as fixed by a board of public works, this imposition is an assessment and not a general tax. The property of the United States, or of the State, or of a municipal corporation is not subject to taxation for revenue purposes.[2] An assessment for benfits conferred by the laying out of a highway, is an exercising of the taxing power. But when the assessment is local, special and limited to a class of persons interested in a local improvement, who are assumed to receive an equivalent for the assessment from benefits conferred by the improvements, it is not in the common acceptation of the term a tax.[3] The Kansas constitution, art. 12, § 5, distinguishes the powers of cities in levying taxes for revenue and for assessments for improvements. They are classed as distinct and independent powers to be exercised in different ways.[4] Under a provision in a charter "not liable to any tax or public imposition whatever," a corporation resisted the payment of assessments made for street improvements; the court held that nothing was intended only to exempt the property from all tax and burdens levied or imposed for purposes of revenue, and not to relieve the corporation from such charges as are inseparably incident to its location with regard to itsproperty.[5]

3. *Special Taxation.*— The Illinois constitution provides for special taxation of contiguous property for local improvements.[6] It has been decided in this State that special taxation, as spoken of in the constitution, is based upon the supposed benefit to the contiguous property, "and differs from special assessments only in the mode of ascertaining the benefits.[7] Special assessment differs from special taxation in this: The assessment cannot exceed the benefits the property will derive from the improvement, and the owner of the property assessed has the right to have this question passed upon by a jury. In cases of special taxation, the jury have nothing to do with the amount which is assessed upon contiguous property. In special taxation the whole of the burden is imposed upon contiguous property, upon the supposed ground that the benefits will be equal or equivalent to the burden cast upon the prop-

Mix v. Ross, 57 Ill. 121.

[2] People v. Austin, 47 Cal. 353.

[3] Bridgeport v. N. Y. & N. H. R. Co., 36 Conn. 265; Williams v. Corcoran, 46 Cal. 553.

[4] Paine A. Sprateley, 5 Kan. 524.

[5] Baltimore v. Cemetery, 7 Md. 512; King v. Portland, 2 Oreg. 146.

[6] Const. 1870, Art. 9, § 9.

[7] Crane v. Tolono, 96 Ill. 255; White v. People, 94 Ill. 607; Enos v. Springfield, 113 Ill. 65

erty.[8] In a late case[9] this question of what special taxation means has been decided. By section 22 of the act to incorporate this railroad, approved February 10, 1851, it is provided that "the said corporation is hereby exempted from all taxation of every kind." It was held that this provision did not exempt the corporation from special taxation of its contiguous property for local improvements. That special taxation does not, in reference to non-exemption, differ from special assessment in providing for the imposing a tax for local improvement upon contiguous property. A special assessment is not embraced within the meaning of the word "taxation," because the owner of the property assessed receives as benefits the amount of his assessment, and is not therefore burdened by a tax. So special taxation of contiguous property cannot be included within the meaning of the general word "taxation," because the owner is compensated for the amount of the tax by the enhanced value of his property, and is not subject to the burden implied in ordinary taxation. The court conclude: "We are, therefore, of the opinion that appellant's right of way was not exempt, by reason of the provision in its charter, from the special tax assessed against it." It has also been held that cities are not exempt from special assessment. While the State may not authorize corporate authorities to levy special assessments upon property of the United States, as it would be an invasion of the rights of a distinct sovereignty, no such reason exists as between the several agencies of the State government, which are subject to its control and direction, and a county may be compelled to pay a special assessment against its court house for local improvements.[10] In Minnesota under a charter of a railroad company which provided for the exemption of its property (other than its land grants) from all assessments and taxes whatever by the city, or by any county, city, town, village or other municipal authority in the State, its property held by it for the purpose of its railroad, is not subject to assessment for local improvements.[11] Also by the Minnesota statute of 1878, ch. 34, § 250, the land and property of a cemetery association were exempt from "all public taxes and assessments." The court held that this exemption extended to assessments for local improvements, as for example; a sidewalk built in front of the property. The court bases the decision on the ground that when both terms "taxes and assessments" are used, the latter evidently in the sense used in the statute, meant burdens or charges to defray expenses of local improvements. Such being the meaning of the statute, the cemetery association was exempt from special assessments for local improvements.[12]

(*a.*) *Charitable Institutions.* — Where a provision in an act incorporating a charitable institution in the State of New York, exempts its real estate from taxation, such real estate is not thereby exempted from an assessment for local improvement; the assessment is not taxation within the meaning of the act.[13] A charter providing that the property shall be "exempted from taxes of every kind," will not protect a charitable institution from paying special assessments for improvements on a street fronting it. Taxes are charges or burdens imposed by the legislature for public purposes, or to defray necessary expenses of the government. A special assessment is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement.[14] So a statute exempting property of an institution "from all taxes, either by the State, parish or city," will not exempt it from liability to contribute to the expense of local improvements in front of property belonging to it, ordered to be paved by an ordinance of a city corporation made in the legal exercise of its authority. Such an assessment is not a tax.[15]

(*b.*) *Churches.*—The same rule applies to church real estate. A law providing "that no real estate belonging to any church shall be taxed by any law of this State" does not exempt from local assessments for improve-

[8] Sterling v. Galt, 117 Ill. 11; Watson v. Chicago, 115 Ill. 78; Springfield v. Green, 120 Ill. 269.

[9] Ill. Cent. R. R. Co. v. Decatur, 126 Ill. 92

[10] McLean County v. City of Bloomington, 106 Ill. 209.

[11] St. Paul, etc. R. R. Co. v. City of St. Paul, 21 Minn. 526.

[12] Oakland Cemetery v. St. Paul, 36 Minn. 529.

[13] Rosevelt Hospital v. City of New York, 84 N. Y. 108.

[14] Sheehan v. Hospital, 50 Mo. 155.

[15] Lafayette v. Asylum, 4 La. Ann. See Crowley v. Copley, 2 La. Ann. 329; Patterson v. Society, 27 N. J. L. 185.

ments. The word "taxes" means burdens, charges or impositions put or set upon persons or property for public uses; but to pay for opening of a street, in the ratio of the benefit or advantage derived from it, is no burden.[16] A church is not exempt from assessment because it is from taxes. Taxes are a public imposition levied by authority of the government for the purpose of carrying on the government in its machinery and operation. Municipal charges are often of local character and for the benefit of a particular neighborhood.[17] The exemptions of the real estate of churches from taxation by the Gen. Stat. ch. 11, § 5, cl. 3, of Massachusetts, is only from taxes imposed for the general purposes of the government, and does not extend to taxation from local improvements.[18] So in Kentucky, church property may be required to pay its proper proportion of the costs of the construction and reconstruction of streets in the city. The exemption made by the general statute in favor of church property, applies to taxes for general purposes of the government, State, county and municipal.[19] In Indiana a different doctrine seems to be announced. A building and ground upon which the same is situated, used for religious purposes are not liable to assessment to contribute to the cost of local improvements in the city. Such property not being valued and assessed upon the tax duplicate for State and county or city taxes, no method is provided by law for its assessment for the purpose of local improvements such as sewerage.[20]

(*c.*) *Educational Institutions.*—The same general rule applies to educational institutions and their real estate is not exempt from local assessments, though it may be free from general taxation. So in Rhode Island it is held that exemption from taxation of the estate used for educational purposes, does not include assessments made for improvements of streets under the law of January 1854. Exemption from all taxes, contained in a charter of a university, does not include such assessments.[21] The same rule applies to public school property. Real estate belonging to a board of public schools of a city is liable to be assessed under and by virtue of an ordinance, for the construction of local improvements which benefit the property.[22] A piece of land owned by a school district upon which its school house stood, and which was used solely for school purposes, and of which no other use was contemplated in the future, can be assessed provided the benefit is direct and immediate, and not contingent and remote.[23] An assessment for local improvements upon land of a college under the statutes of 1866, ch. 174, and 1868, ch. 276, of Massachusetts, of a part of the expense of altering a street, proportionately to the benefit received by the assessed land from the alteration, is a "civil imposition" within the meaning of that term in the clause of the college charter of 1650, exempting from all "civil impositions," taxes and rates, lands of the college not exceeding a certain annual value.[24] And the property of a literary and scientific society is only exempt from taxes when used exclusively for literary and scientific purposes. If used for other purposes, it is liable to taxation, although the proceeds in future are to be applied for the promotion of literature and science.[25]

(*d.*) *Railroad Property.*—Where a charter of a railroad provides for the payment by the company of State taxes and contains a *proviso* "that no other tax or imposition shall be levied or assessed upon said company," the word "assessed" is used merely to describe the act of levying the tax or imposition, and the company is not by the *proviso* exempt from assessments for local improvements.[26] So where a charter to a railroad corporation provided that its property should be exempt "from taxation of every kind," does not exempt the corporation from special taxation which does not, in reference to non-exemption, differ from special assessments for local improvements.[27] The estate of a street railway company in the street of a city is prop-

[16] In the matter of the Mayor of New York, 11 Johns. 77.
[17] North Liberties v. Church, 1 Harris (Pa.), 104.
[18] Society v. Boston, 116 Mass. 181. See Ottawa v. Free Church, 20 Ill. 423.
[19] Church v. McAtee, 8 Bush, 508.
[20] Presby. Church v. Fort Wayne, 36 Ind. 338.
[21] In Matter of College St., 8 R. I. 474.
[22] St. Louis Public Schools v. City of St. Louis, 26 Mo. 468. See also Lockwood v. St. Louis, 24 Mo. 20.
[23] Hartford v. District, 45 Conn. 462.
[24] Harvard College v. Boston, 104 Mass. 470.
[25] Cincinnati College v. State, 19 Ohio, 110.
[26] New Jersey R. R. Co. v. Jersey City, 42 N. J. L. 97.
[27] Illinois Central R. Co. v. City of Decatur, 18 N. E. Rep. 315; 126 Ill. 92.

erty capable of being enhanced in value by widening of the street, and by such widening a substantial benefit may accure to the railway company, and the company can be assessed for benefits derived from local improvements.[28] Benefits for local improvements may be assessed upon franchises of a railroad company, where they are direct, immediate and certain. But contingent, remote, unappreciable or uncertain benefits will not authorize such assessments.[29] A corporation, like a railroad, has no rights to be recognized in a proceeding for local improvements as peculiar, sacred or superior to those of a private individual.[30] The rails, sleepers, ties and spikes of a horse railroad company so laid into and attached to the soil of the street, as to become a part of the railroad, are real estate and as such liable for the expense of local improvements.[31] A lot owned upon a street by a railroad company is subject to assessment for local improvements, and the fact that the property belongs to the railroad company and is used for railroad purposes furnishes no more reason why it should be exempt from an assessment than if it belonged to a natural person.[32] So the depot grounds of a railroad company being within the limits of a city are subject to taxation for improvements of the city's streets[33] and other local improvements.[34] And lands appropriated by a railroad company for its track through a city, and crossing an improved street at right angles, and upon which the track was constructed, the work having been completed, are liable to be assessed for local improvements.[35] A street railway company occupying a portion of a street with its track, and having a franchise to the right of occupancy, can be made to pay special assessments for local improvements when they are of a character to render substantial benefits by the paving of such streets, and in proportion as the company is benefited, it must contribute its share to the cost of the improvement in common with the other property upon the street.[36] Where a horse railway constructs its road in one of the streets of a city with the agreement that the company shall keep so much of the street as it occupies in repair, according to the requirements of the common council for the repairs of such street, but that the company was to be exempt from assessment for grading, paving, macadamizing, filling or planking the street, or parts of streets upon which it should construct its railways, it was held that this agreement did not exempt the company from assessments to defray the expenses of the widening the streets upon which its railways are constructed.[37]

(*e.*) *County Buildings.*—Whether county real estate can be assessed for local improvements came before the Supreme Court of Illinois in a late decision.[38] The county court house is situated in the city of Bloomington on a square. A judgment was rendered against the court house square of the county of McLean in favor of the city of Bloomington upon a special assessment for the improvements of the adjacent streets by paving. The court held that an exemption, in the exclusion of the property liable to special assessment, must specifically appear. The general language of the statute authorizing cities to make improvements by special assessments, includes the property of counties, cities and the like, as well as private property, unless specifically exempted by the act. A State may authorize a burden to be imposed on one of its agencies to the extent it is benefited by another agency, for the benefit of the entire public. But the State may not authorize corporate authorities to levy special assessments upon property of the United States. Such a proceeding would be an invasion of the rights of a distinct sovereignty and invalid. But no such reason exists as between the several agencies of the State, and they can be compelled to pay special assessments. The gen-

[28] Appeal of Kearney St. 32 Cal. 499. See also Emory v. San Francisco Gas Co., 28 Cal. 345; People v. Lawrence, 36 Barb. 181.

[29] Bridgeport v. N. Y. & N. H. R. Co., 36 Conn. 255.

[30] Bradley v. N. Y. & N. H. R. Co., 21 Conn. 306. See also Armington v. Barnet, 15 Vt. 145; Piscataque Bridge Co. v. Bridge Co., 7 N. H. 67; Bacus v. Lebanon, 11 N. H. 23; Chicago v. Larned, 34 Ill. 203; King v. Patterson, 2 Oreg. 146.

[31] New Haven v. Fair Haven, etc. R. Co., 38 Conn. 422.

[32] Ludlow v. Trustees, 78 Ky. 357.

[33] Railroad Co. v. Mount Pleasant, 12 Iowa, 112.

[34] Railroad v. Spearman, 22 Iowa, 112.

[35] Railroad Co. v. Connelly, 10 Ohio St. 159. See also Railroad Co. v. Wright, 5 R. I. 459.

[36] City of Chicago v. Baer, 41 Ill. 306. See also Railway Co. v. City of Chicago, 90 Ill. 573.

[37] Parmerlee v. Chicago, 60 Ill. 267.

[38] McLean County v. City of Bloomington, 106 Ill. 209.

eral doctrine is that special assessments and special taxation do not come under taxation for revenue; that property when thus assessed derives a benefit equivalent to the amount paid by the owner. Such improvements are local and for the benefit of the particular locality or for the convenience of a particular district, and such an assessment or taxation of contiguous property cannot be regarded as a burden or charge imposed upon property to raise money for public purposes, except that the public may indirectly be benefited by the use of a local improvement. So exemption from taxation of every kind as provided for in many charters does not exempt from special assessment and special taxation. But a late decision of the Supreme Court of Minnesota does not seem to be in accord with this general doctrine.[39]

D. H. PINGREY.

[39] Oak Cemt. v. St. Paul, 36 Minn. 529.

PARENT AND CHILD — NECESSARIES — LIABILITY OF PARENT.

PORTER V. POWELL.

Supreme Court of Iowa, January 29, 1890.

1. *Minor Child—Necessaries—Liability of Parent.*—It is the legal and moral duty of parents to furnish necessary support to their children during minority, and when a stranger furnishes necessaries for a minor child, a promise to pay therefor by the parent may be inferred from the legal duty imposed.

2. *Emancipation of Child—Proof—Reassertion.*—A parent may waive his right to the care, custody, control or service of his child during minority, or any one of such rights, and for the whole period of the minority or for a part thereof, but a waiver of one right is not a waiver of another, and he may reassert such right within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. Such waiver may be proved directly or from circumstances.

3. *Partial Emancipation—Necessaries—Liability.*—When a father allows a minor daughter to go away and earn wages and provide herself with clothing, he not furnishing or agreeing to furnish her with any money, there has been but a partial emancipation, in the absence of other evidence, and the father is liable for necessaries furnished to her.

The district court certifies to this court the following question, upon which it is desirable to have the opinion of the supreme court: "Is a father legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who at the date of said treatment, was seventeen years of age, and was then, and had been, residing away from her father's house for three years prior to the rendition of said services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing, or agreeing with his daughter to furnish, her with any money, or means of support, but consenting to her absence from home; the said professional services being rendered at the request of the said minor daughter, but were rendered and furnished without the procurement, knowledge, or consent of the defendant, and without knowledge of the sickness, until demand was made for payment of said services by plaintiff the attendance of plaintiff being from day to day, for a period of twenty days?" Judgment for plaintiff. Defendant appeals.

GIVEN, J.: 1. Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforceable in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See Kelley v. Davis, 49 N. H. 187; Farmington v. Jones, 36 N. H. 271; Gordon v. Potter, 17 Vt. 348. A different doctrine has long since been held in this State. In Dawson v. Dawson, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In Johnson v. Barnes, 69 Iowa, 641, 29 N. W. Rep. 759, which was an action by the mother, who had been divorced, against the father, for the support furnished their children, the court say: "As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common law is somewhat uncertain, ill defined, and doubtful. Indeed, it has been said that there is no such obligation. * * * But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person, who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed." In Van Valkinburgh v. Watson, 13 Johns. 480, it is said: "A parent is under a natural obligation to furnish necessaries for his infant children; and, if the parent neglect that duty, any other person who supplies such

necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." In 5 Wait, Act. & Def. 50, the author says: "The duty of parents to support, protect, and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. * * * In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. * * * The legal obligation of parents in respect to support, extends only to those things which are necesary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them." Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

2. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn. Parents are entitled to the care, custody, control, and services of their children during minority. To emancipate is to release; to set free. It need not be evidenced by any formal or required act. It may be proven by direct proof or by circumstances. To free a child, for all the period of minority, from care, custody and service would be a general emancipation; but to free him from only a part of the period of miniorty or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control, and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody, and control, so far as the same can be exercised consistently with the right waived. He frees his son of 18 from service for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period any parent may assert his right to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. In the law of contracts, where a father expressly or impliedly, by his conduct, waives his right generally to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts, as are made with him for his services. Nightingale v. Withington, 15 Mass. 272; McCoy v. Huffman, 8 Cow. 84; Stiles v. Granville, 6 Cush. 458; Schouler, Dom. Rel. § 267. There is nothing in these authorities, nor any reason, against the view expressed, that emancipation may be general or limited. There is no direct evidence as to the purpose of the defendant with respect to his daughter; but we are to say, from the circumstances shown, whether they evidence either a general or limited emancipation. The case of Everett v. Sherfey, 1 Iowa, 358, is relied upon. That was an action to recover damages of the defendant for having harbored and retained the plaintiff's minor son in his employ. The issues and circumstances were quite different from those certified in this case. The court say: "There could be no such harboring as would render the defendant liable to the father in this action, if the son was in truth emancipated, and, if the son was not emancipated, it will still be a question whether there was such harboring as renders the defendant liable. By 'emancipation,' in this connection, we understand such act of the father as sets the son free from his subjection, and gives him the capacity of managing his own affairs as if he was of age." The following is given as a condensed statement of the facts: "In the spring or summer of 1852, plaintiff's son, a minor of the age of seventeen, went to reside at defendant's house, and was then and afterwards employed by him as a hired hand for over one year; the defendant paying the son full wages for his services. In February, 1853, plaintiff sued defendant to recover for the services, in which suit the judgment was for the defendant. The son was of a dissatisfied and roving disposition, careless and improvident in his habits, not under parental control, and, either through willfulness or negligence, had not received the education proper for a person of his age and condition. In December, 1851, a misunderstanding arose between the parent and the child, which resulted in the son's leaving home, and residing and working at various places, before he went into the defendant's service. After said December, 1851, the father did not, apparently have or exercise the proper and necessary control and authority over the said minor that a parent of a well-regulated family ought and should exercise, and permitted and sanctioned the hiring out of said minor at various places, and at different employments, away from home; but who made the contracts, or received the pay, is not stated nor proven. The father had also stated that he had no control over his son, and had in some instances waived his authority over him. It also appears that on the 11th of September, 1852, the plaintiff, by publication in a newspaper, forewarned all persons from crediting his said son on his account, avowing, also, therein that he would pay no debts of his contracting, and that he would not fulfill any contracts, or pay debts, entered into by him." The court say:

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"From these circumstances, to mention none others, we think the court might fairly conclude there was a manumission or emancipation up to the time above stated, and that there was no liability for giving the son shelter, residence, and a home. At least, we think it so fairly deducible from the facts that we should not disturb the conclusion."

The circumstances disclosed in this case are these: The defendant's daughter, at the age of 14, went to reside away from her father's house, at a place 30 miles distant, where for three years she contracted for, earned, and controlled her own wages, and provided herself with clothing, her father consenting thereto; he not furnishing, or agreeing to furnish her with any money, or means of support. That, while thus absent she was dangerously attacked with typhoid fever, and at her request was attended by the plaintiff, as her physician, from day to day, for the period of 21 days, which services were rendered without the procurement, knowledge, or consent of the defendant. These circumstances are widely different from those in Everett v. Sherfey. Here there was no disagreement that resulted in the daughter leaving home; no want or waiver of parental authority; no dissatisfied and roving disposition; no statement by the father that he had no control over his daughter; and no publication by the father notifying persons not to credit her on his account. The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents, either from necessity or from a desire to teach their children to be industrious and self-supporting, emancipate them from service for a definite or indefinite time without any intention of thereby releasing their right to exercise care, custody, and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy sickness, or accident—who, most of all others, need support—would not be entitled to it. Blackstone, in his Commentaries, (volume 1, p. 446,) says: "The duty of parents to provide for the maintenance of their children is a principle of natural law,—an obligation, says Puffendorf, laid on them, not only by nature herself, but by their own proper act in bringing them into the world for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents." This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessaries. What are necessaries must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right care, custody, control and services, with the duty to support.

3. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service and to claim his care, custody, control, and support. There was no such an emancipation as exempted the father from liability for actual necessaries furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessaries furnished to her. As already stated, what are necessaries must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence. Our conclusion is that the judgment of the district court should be affirmed. Beck J. dissents.

NOTE.—All the authorities agree that there is a moral obligation on parents to provide for the wants and necessities of their children during their minority. Whether this moral obligation is also an obligation imposed by common law, is a matter much questioned. The English courts have vascillated, but now hold that the common law imposed no such obligation, but that parents could, under certain circumstances, be compelled to support minor children under the statute of 43 Eliz.[1] A number of the American Decisions have adopted the English rule.[2]

[1] Mortimore v. Wright, 6 Mee. & W. 481.

[2] Raymond v. Loyl, 10 Barb. 483; Hunt v. Thompson, 3 Scam. 179; Varney v. Young, 11 Vt. 258; Gordon v. Potter, 17 Vt. 348; Kelley v. Davis, 49 N. H. 187.

But the weight of American authority agrees with the decision in the principal case, that this obligation is imposed by the common law.[3] The statute of 43 Eliz. has been regarded as a recognition of the principles of the common law.[4] As an outgrowth of this principle, when the parent has failed to provide for the necessities of the child, and other parties have supplied such wants, the parent has been held liable therefor on his presumed consent to such action. Such liability only accrues when an absolute necessity for such assistance exists.[5] If a father forces his child abroad to seek a sustenance, under such circumstances he sends a credit with him, and is liable for necessaries furnished.[6] If a father sends a son away to school and fails to provide the clothing required by the climate and the child's growth, the child may procure them on his credit.[7] Generally a parent is liable when he places his minor child in a situation to require necessaries without providing the means for obtaining them.[8]

Emancipation of Child.—Whether the duty of the parent to support his minor child arises from the common law or statutory law, or is a mere moral obligation, yet it is always conceded that the parent is entitled to and owns all the earnings of his minor children. Such right the parent may waive or relinquish in favor of the child, which is called emancipating the child. Such emancipation may be evidenced by gift, agreement, inference or conduct.[9] It exists: If the father waives his rights and permits his son to make contracts and acquisitions for himself;[10] if the father drives his son from his home;[11] if he compels his minor child to go abroad to earn his livelihood, or consents thereto, and neglects to support him;[12] if he permits the child to work for himself and claim and enjoy his own wages;[13] or it may arise from the misfortune of the parent, as where the parent is an insane pauper and is supported at public expense.[14] The emancipation of a child requires no token or ceremonial [15] and no consideration.[16] It may be a mere matter of inference from the conduct, acts and transactions of the parent and of the child.[17] Such emancipation may be for a part or for all of the minority,[18] or it may be confined to the specific earnings in a particular case.[19] Since a father holds his rights over his children as a personal trust, which he cannot alienate,[20] he may emancipate his minor child, though he himself be insolvent.[21] His creditors cannot demand that the children be required to work for their benefit;[22] in fact, they cannot prevent the debtor from giving away his own labor by laboring for no wages.[23] Though the son is emancipated, he may continue to reside with the family, and such residence is no evidence of fraud as against the father's creditors.[24] Whether such emancipation or such waiver of the minor's wages can be revoked, may be still considered to be unsettled. It has been held to be a mere license, which can be revoked at will,[25] and that it may become the parent's duty so to do,[26] but no creditor of the latter can interfere and demand such revocation.[27] Other courts have held, that there can be no revocation and no reclamation, and that the emancipation operates as a release of the father's right.[28] The decisions all agree that a revocation of the emancipation cannot invalidate prior payment of wages made to the minor under contract with him. If the minor gave a valuable consideration to his parent for his emancipation, no doubt the contract would be irrevocable by the parent alone, but such cases are probably quite rare.

Liability after Emancipation.—If the right on the part of the parent to the child's earnings and the right on the part of the child to a support from the father are correlative rights, one growing out of the other, then the emancipation of the child should release the parent from all further liability, and it has been so held.[29] It has been considered that the right to receive a minor's earnings is simply incidental to the parent's duty to discipline and direct him, and the custody of the person is secured for that purpose—and though the child is emancipated as to services, the duty of discipline remains.[30] In such case it would not necessarily follow that the parent's liability for necessaries furnished should cease. Again, it has been held that the duty imposed by law upon the father, to maintain his minor child in case of his inability to maintain himself, rests on considerations of public policy, looking to the protection of the community, and it cannot be renounced at his pleasure, nor the burden transferred to one who is not deemed in law generally competent to contract, nor capable of performing such a duty.[31] Nor can a father by abandoning his duty and trust, by putting his child out of his protection, thereby exonerate himself from its maintenance, education and support.[32]

S. S. MERRILL.

[3] Edwards v. Davis, 16 Johns. 281; Hillsborough v. Deering, 4 N. H. 95; Benson v. Remington, 2 Mass. 113; 2 Kent's Com. 191; 15 Cent. L. J. 23; Girls' Industrial Home v. Fritchey, 10 Mo. App. 344.

[4] Guion v. Guion, 16 Mo. 48.

[5] Poock v. Miller, 1 Hilt. 108.

[6] Stanton v. Willson, 3 Day, 37.

[7] Parker v. Tillinghast, 9 N. Y. St. Rep. 510.

[8] Huntoon v. Hazelton, 20 N. H. 388.

[9] 18 Cent. L. J. 95.

[10] Cloud v. Hamilton, 11 Humph. 104.

[11] U. S. v. Bainbridge, 1 Mason, 71.

[12] Lind v. Sullenstadt, 21 Hun, 364.

[13] Dierker v. Hess, 54 Mo. 246.

[14] Jenness v. Emerson, 15 N. H. 486.

[15] Dierker v. Hess, *supra.*

[16] Fort v. Gooding, 9 Barb. 371; Jenness v. Emerson, *supra;* Stanley v. National U. Bank, 115 N. Y. 122.

[17] Bener v. Edgington, 76 Iowa, 105; Holliday v. Miller, 29 W. Va. 424; Monaghan v. School Dist., 29 Wis. 100; Huntoon v. Hazelton, 20 N. H. 388; Canovar v. Cooper, 3 Barb. 115; Stiles v. Granville, 6 Cush. 458; Corey v. Corey, 19 Pick. 29; Lackman v. Wood, 25 Cal. 147.

[18] Tillottson v. McCrillis, 11 Vt. 477.

[19] Stiles v. Granville, 6 Cush. 458.

[20] People v. Mercein, 3 Hill, 399; Hall v. Hall, 44 N. H. 293.

[21] Beaver v. Bare, 104 Pa. St. 58; Atwood v. Holcomb, 39 Conn. 270; Shortel v. Young, 23 Neb. 408; Clemens v. Bullhart, 17 Neb. 335.

[22] Chase v. Elkins, 2 Vt. 290; Wilson v. McMillan, 62 Ga. 16.

[23] Wilson v. McMillan, *supra.*

[24] McCloskey v. Cupert, 27 Pa. St. 220; Dierker v. Hess, 54 Mo. 246; Beaver v. Bare, 104 Pa. St. 58.

[25] Soldanels v. Missouri, etc. R. Co., 23 Mo. App. 516; Agricultural & M. Assn. v. State (Md.), 29 Cent. L. J. 250.

[26] Chase v. Elkins, 2 Vt. 290.

[27] Chase v. Elkins, *supra;* Wilson v. McMillan, 62 Ga. 16.

[28] Hall v. Hall, 44 N. H. 293; Lackman v. Wood, 25 Cal. 147.

[29] Campbell v. Cooper, 34 N. H. 49; Johnson v. Gibson 4 E. D. Smith, 231; Hillsborough v. Deering, 4 N. H. 95; Jenness v. Emerson, 15 N. H. 486.

[30] Beaver v. Bare, 104 Pa. St. 58.

[31] Hall v. Hall, 44 N. H. 293.

[32] Stanton v. Willson, 3 Day, 37.

RECENT PUBLICATIONS.

RIGHTS, REMEDIES AND PRACTICE at Law, in Equity and under the Codes. A Treatise on American Law in Civil Causes, with a Digest of Illustrative Cases. By John D. Lawson, Author of Works on Presumptive Evidence, Expert Evidence, Carriers, Usages and Customs, Defenses to Crimes, etc. In seven volumes. Vols. 1, 2, and 3. San Francisco: Bancroft-Whitney Co. Law Publishers and Law Booksellers. 1889.

We know of no one better equipped, by experience, education and habits, than Mr. Lawson, to undertake the preparation of so formidable a work as this series on "Rights, Remedies and Practice." Its successful completion involved not only many years' labor, but also the greatest industry and care, and we are not guilty of idle flattery in saying that the volumes give proof on every page of careful and conscientious work. We do not need to be told that the author spent the greater part of five years in its preparation. The wonder is that even within that period of time seven volumes, as complete as these, containing the substantive law of this country, and the authorities carefully and thoroughly collated, can be made. The tendency on the part of law-book writers and publishers seems to be in the direction of compilations. "Encyclopedias" and "Series" are in some measure taking the place of separate text-books. Wait's Actions and Defenses gave impetus to this kind of work, and the Encyclopedia of the Law added fresh interest. And to some extent this is natural. The body of the law, by reason of the great number of decisions from day to day, and increasing in number each year, is becoming so bulky that the average country practitioner cannot afford to keep up with the increasing number of text-books. He, therefore, welcomes such a series as this which gives him a complete library in itself on all subjects liable to arise in his practice. He may not, as a matter of fact, be able to get as much out of them as if he bought complete text-books on all the subjects covered by the work, but for the money he pays he finds considerably more than in text-books involving the expenditure of the same amount of money. Therefore, compilations are much in demand. Such as are carefully, accurately, and thoroughly prepared should be welcomed. But there is such a temptation on the part of the compilers to prepare them, so to speak, by machinery and by the liberal use of scissors, that each should be well examined before recommended to the profession.

The author states that the work is "an ambitious attempt to present a complete view of American case law on every species of right and remedy, of action and defense, both at law and in equity." It aims to cover the entire field of jurisprudence except criminal law. It combines the advantages at once of a treatise and digest. Preserving the scientific arrangement of a text-book, it adds to this a full collection of the actual results of decided cases on their facts, as illustrations of the principles of the text. The work is divided into four divisions, viz.

DIVISION I. PERSONS AND PERSONAL RIGHTS.—Under this division are the subjects of principal and agent; attorney and client; auctioneers, brokers, and factors; master and servant; corporations in general; different classes of corporations; banks; railroads; gas companies; building and loan associations; voluntary associations; clubs and societies; religious societies and corporations; charitable associations; partnership; husband and wife; parent and child; guardian and ward; executors and administrators.

DIVISION II. PERSONAL RIGHTS AND REMEDIES.—Under this division are personal wrongs and torts; conspiracy; assault and battery; false arrest and imprisonment; malicious prosecution; torts in domestic relations; seduction; *crim. con.*; negligence; slander and libel.

DIVISION III. PROPERTY RIGHTS AND REMEDIES.—Under this division are personal property; gifts; animals; copyright; trade-marks; patents; negotiable instruments; ships and shipping; bailments; pledges; innkeepers; carriers; railroads; telegraph companies; physicians and surgeons; contracts; liens; mortgages; insurance; real property; water and water-courses; easements; licenses; landlord and tenant; fixtures; trusts and trustees; nuisances.

DIVISION IV. PUBLIC RIGHTS AND REMEDIES.—Under this division are constitutional law; taxation; eminent domain; municipal corporations; public offices and officers; schools; elections; conflict of laws.

The first three volumes before us embrace the subjects within Divisions I. and II., and a portion of Division III., viz: Property Rights and Remedies. A volume will be issued at the rate of about one in every three months until the seven volumes are completed. Each volume is to be provided with its own index and on the completion of the entire work a comprehensive index to the whole is promised.

There is one feature of this work which is not to be found in any other law book except some of Mr. Lawson's earlier works, viz: The addition at the end of each section of an illustration of the principle embodied in that section. This will be found of practical value, in throwing light upon abstract legal propositions. The author's style is concise, terse and vigorous. The authorities are carefully and diligently collected and the notes very copious. We do not hesitate to say that the character of the work places it above anything of the kind ever before attempted in this country. The type used is clear and the mechanical execution of the work first class in every regard.

BOOKS RECEIVED.

LAWYERS' REPORTS, ANNOTATED. Book V. All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Burdett A. Rich, Reporter. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1889.

HUMORS OF THE LAW.

TOO MUCH FOR HIM.—His counsel announced to him that his motion for a new trial was refused and that he would have to hang.

"On the strength of it," added the lawyer, "the newspapers are publishing your picture."

"Merciful powers. It is too much," groaned the wretched prisoner. "What have I done to deserve this awful punishment?"

THOUGHT IT UNCONSTITUTIONAL.—The Washington correspondent of the New York *Tribune* tells the following good anecdote:—

"That must have been a near relative of Senator Call, of whom Colonel W—, of the Engineer Corps, told me the other day. The Colonel had been sent down to a certain Florida stream, the improvement of which was contemplated in one of the river and harbor bills, with instructions to guage its water. While engaged with his men in this operation, an old fellow came along with a cart drawn by a single ox, on which was a small quantity of wood. Halting his team as he came near, he said:—

" 'What on 'arth are them men doin' thar?'

" 'Well,' replied the Colonel, 'they are trying to find out how many bucketfuls of water run down this creek in twenty-four hours?'

"The man gazed at the party in mute wonder and asked:—

" 'Mister, are that a fact?'

" ' Yes,' said the colonel, 'that is just what they are doing.'

"After an earnest contemplation, the man shook his head, and in grave tones replied:—

" 'Well, mister, it do appear to me that that thar thing are onconstitutional.' "

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION—Vendor's Lien.— On an administrator's sale of land, the price of which the intestate had not fully paid, the intestate's vendor will not be preferred in the distribution of the proceeds, unless he has given public notice that his interest also might be sold, or shows that the land brought its full value. — *Thompson v. Atwater*, Ga., 10 S. E. Rep. 718.

2. ADMINISTRATION—Sale to Pay Debts.— An auxiliary administrator, appointed in Iowa, of a Pennsylvania estate, alleged in his petition for the sale of Iowa lands to pay debts, that claims in excess of the assets had been proved against the estate, in Pennsylvania, and that claims had also been proved in Iowa: *Held*, that the surplus proceeds, after paying the Iowa claims should be transmitted to the principal administrator for the payment of the claims proved in Pennsylvania. —*In re Gable's Estate*, Iowa, 44 N. W. Rep. 352.

3. APPEAL — Assignment of Errors. — Rulings of the district court, made in the course of a trial, are not available as grounds of error in the supreme court, unless the district court has had an opportunity to re-examine and correct them upon a motion for a new trial, and unless the overruling of that motion is assigned as error in the supreme court.—*City of McPherson v. Manning*, Kan., 23 Pac. Rep. 109.

4. APPEAL—Evidence—Record.— Where the ruling of a district judge upon an application for a temporary injunction is brought to the supreme court on a case made, the question of whether the testimony was sufficient to sustain the application cannot be reviewed, unless there is in the case made itself a statement or showing that it contains all the testimony offered on the application.—*State v. Board of County Commissioners*, Kan., 23 Pac. Rep. 101.

5. APPEAL— Death of Party. — If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminated, and any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest. — *Coffin v. Edgington*, Idaho, 23 Pac. Rep. 80.

6. ASSIGNMENT — Notice to Debtor. — Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, where there is no controversy between different assignees or attaching creditors of the fund assigned.—*Jackson v. Hamm*, Colo., 23 Pac. Rep. 88.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS. — The holder of a judgment note demanded payment, and was told by the debtor that he should have to make an assignment. Judgment was then entered on the note, and immediately thereafter the debtor assigned. The judgment was not entered at the debtor's request, nor was the assignment delayed for the benefit of the creditor: *Held*, that the judgment, having been entered in good faith, was not void under Rev. St. Ill. 1889, ch. 10, § 13, which forbids preferences in assignments. — *Home Nat. Bank v. Sanchez*, Ill., 23 N. E. Rep. 405.

8. ATTACHMENT — Dissolution. — The judgment of a court vacating an attachment is not an adjudication of the merits of the action.— *Stapleton v. Orr*, Kan., 23 Pac. Rep. 109.

9. ATTACHMENT — Non-resident. — A railroad contractor, who has left the State, and gone to a foreign country for the purpose of prosecuting his business there, and who, if successful in obtaining contracts, will remain at least as long as will be necessary for their completion, and who has actually been gone four months, though he has repeatedly stated before leaving that he intended to return shortly, is "not residing" in the State within the meaning of Code Civil Proc. Cal. § 537.—*Hanson v. Graham*, Cal., 23 Pac. Rep. 56.

10. ATTORNEY AND CLIENT—Contracts. — An attorney who has agreed to sue for certain land at his own expense, in consideration that he should receive one-half of whatever interest he might recover therein, cannot, in an action for money received by him as a compromise of the suit, allege as a defense that he recovered no interest in the land. — *McRaven v. Dameron*, Cal., 23 Pac. Rep. 33.

11. CARRIERS OF PASSENGERS — Negligence.— A child nine years of age who was carried several blocks, the driver (who was also conductor) knowing him to be on board, was a passenger, whether he intended to pay fare or not, and was entitled to the diligence due to passengers of his age and discretion. — *Metropolitan St. R. Co. v. Moore*, Ga., 10 S. E. Rep. 730.

12. CORPORATIONS— Stockholder's Liability. — In an action against the stockholders of a corporation on its renewal notes, which are claimed to have extinguished the old notes, the complaint should allege that defendants were stockholders of the corporation when the renewals were made. — *Hyman v. Coleman*, Cal., 23 Pac. Rep. 62.

13. CONSTABLES—Fees. — Under Pen. Code Cal. § 819, a constable may recover his fee for executing in another county a warrant issued by a justice of the peace, though the complaint does not allege that the warrant was indorsed by a magistrate of the county in which it was executed, as it will not be presumed that the constable acted unlawfully. —*Allen v. Napa County*, Cal., 23 Pac. Rep. 43.

XUM

14. CONSTITUTIONAL LAW. — Const. Mont. art. 3, § 8, providing that all criminal actions in the district court, except those on appeal, may be prosecuted by information, etc., cannot become operative until the enactment by the legislature of laws defining the details which affect the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the State and the accused, so that the courts may be enabled to carry the provision into effect. — *State v. Ah Jim*, Mont., 23 Pac. Rep. 76.

15. CONSTITUTIONAL LAW—Title of Act.—Under Const. Ala. art. 4, § 2, providing that "each law shall contain but one subject, which shall be clearly expressed in its title," the provisions of Act Feb. 5, 1885, entitled "To constitute the town of Blountsville and vicinity, in Blount county, a separate school-district," which prohibits the sale of intoxicating liquors within the district, is unconstitutional, as it is not cognate, pertinent, or germane to the subject expressed. — *Montgomery v. State*, Ala., 7 South. Rep. 51.

16. CONTRACT—Set-off. — Where a defendant did not intend to charge the plaintiff anything for various items when they were furnished, and so testified, he cannot, after an action has been commenced, make charges for them, and recover thereon. — *Collins v. Martin*, Kan., 23 Pac. Rep. 95.

17. CRIMINAL LAW— Assault with Intent to Kill. — To support a conviction for assault with intent to murder, specific intent to take life is not essential. An assault with intent to do grevious harm to the person of another, accompanied with ability to effect it, without legal excuse or sufficient provocation, constitutes the offense.—*Smith v. State*, Ala., 7 South. Rep. 103.

18. CRIMINAL LAW— Homicide—Self-defense. — Where one charged with homicide is the original agressor, he cannot ordinarily justify on the ground of necessity for the killing; but if he withdraws from the conflict in good faith, and clearly shows his desire for peace, his right of self-defense revives, and if he is pursued, and taking life becomes inevitable to save life, he is justified.—*Parker v. State*, Ala., 7 South. Rep. 98.

19. CRIMINAL LAW—Confessions.— If information derived from a confession of crime leads to the discovery of material facts, which go to prove the commission of the crime, so much of the confession as strictly relates to the facts discovered will be received in testimony, though the confession may not be shown to have been voluntary.—*Lowe v. State*, Ala., 7 South. Rep. 97.

20. CRIMINAL LAW—Homicide— Evidence. — On a trial for wife murder, evidence as to the conduct and conversation of the defendant in reference to a girl with whom he was infatuated, done and had both before and after the death of his wife, and his conduct and remarks tending to show dissatisfaction with his wife, is competent, as tending to prove a motive for the commission of the crime. — *Duncan v. State*, Ala., 7 South. Rep. 104.

21. CRIMINAL LAW— Reasonable Doubt. — An instruction that "the proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own" does not correctly state the law of reasonable doubt.—*Palmerston v. Territory*, Wyo., 23 Pac. Rep. 73.

22. CRIMINAL LAW — Embezzlement. — Defendant hauled several bales of cotton to a gin-mill for the owner of the cotton. One of the bales he marked with his son's name, and he also took the receipt for it in the same name. Afterwards, on being questioned as to the number of bales he had taken to the mill, he turned the receipt over to the owner: *Held*, that defendant was not guilty, within Code Ala. 1886, §3795, which requires that to prove embezzlement defendant must be shown to have fraudulently converted to his own use, or fraudulently secreted it with intent to convert it to his own use.—*Penny v. State*, Ala., 7 South. Rep. 50.

23. DIVORCE — Physical Incapacity. — "Physically incapacitated," as a statutory ground for divorce, means substantially the same as "impotent."— *Anoymous*, Ala., 7 South. Rep. 100.

24. DIVORCE — Alimony. — Civil Code Cal. § 141, which prescribes that in executing the provisions of § 139, providing for the maintenance of the wife in case of divorce, the court shall resort first to the community property, and then to the separate property of the husband, does not embrace the earnings of the husband after divorce.—*In re Spencer*, Cal., 23 Pac. Rep. 37.

25. ELECTION CONTESTS — Pleading. — In an election contest based on illegal votes, a petition which fails to give a list of the persons alleged to have illegally voted is insufficient, within Laws Colo. 1885, p. 197, § 15. — *Schwarz v. County Court*, Colo., 23 Pac. Rep. 84.

26. EMINENT DOMAIN—Damages— Evidence.—Where a part of a farm is taken for railroad purposes, inconvenience to the farm, and danger from fire to buildings, fences, timber or crops upon the remainder, may properly be considered in estimating the depreciation in the value of the property. — *St. Louis, etc. R. Co. v. McAuliff*, Kan., 23 Pac. Rep. 102.

27. EQUITY—Partition—Fraud.— Where, in a partition suit against infant defendants, the complainant conceals the suit from the infants' relatives, induces their guardian *ad litem* to neglect their interests, and, by collusion with the commissioners, procures a low appraisement of the land, and buys it in at about half its real value, said defendants may, at any time during their minority, bring an original bill to impeach the partition decree for fraud.— *Stunz v. Stunz*, Ill., 23 Pac. Rep. 410.

28. EQUITABLE LIENS—After-acquired Property. — An agreement under which defendants were to make advances to a firm of cotton brokers, to be used in paying for cotton to be purchased by them during the ensuing cotton season, on condition that all the cotton bought and paid for should be the property of defendants until they were repaid all money advanced, and the right to ship and sell it whenever deemed necessary for their protection, creates neither a mortgage at law nor a pledge of specific cotton, though it gives defendants an equitable lien on the cotton as it is bought. — *Barnes v. Alabama State Bank*, Ala., 7 South. Rep. 91.

29. EVIDENCE—Robbery—Hearsay.— On the trial of an indictment for robbery, unsworn statements by the victim of the robbery, which she was heard to make several hours after the alleged robbery, purporting to be explanatory of the transaction, are inadmissible in evidence.—*Moses v. State*, Ala., 7 South. Rep. 101.

30. EVIDENCE—Record of Justice of the Peace.—A certified copy of the record of a case tried before a justice of the peace is not admissible in evidence when the certificate does not show that the person signing it was justice of the peace at the time of signing, and there is no proof that he was in any way the legal custodian of the record.—*Stamper v. Gay*, Wyo., 23 Pac. Rep. 69.

31. EVIDENCE—Homicide.— On a trial for murder, evidence that defendant, immediately after inflicting the death wound on deceased, pursued and shot at another who was present and took part in the altercation, is admissible, not only as a part of the *res gestæ*, but as tending to show the hostile spirit under which defendant acted.—*Smith v. State*, Ala., 7 South. Rep. 52.

32. EXEMPTIONS—Procedure. — Code Ga. § 2003, allowing the amendment of a petition for exemption, authorizes an amendment of the schedule required to be appended to the petition, only by adding omitted articles, not by striking out anything.—*McWilliams v. Bones*, Ga., 10 S. E. Rep. 723.

33. FALSE IMPRISONMENT — Vagrancy. — As Rev. St. Wyo. § 3647, expressly confers jurisdiction of the offense of vagrancy on justices of the peace, and authorizes the commitment of the offender, such a commitment does not constitute false imprisonment. — *Wolcott v. Bachman*, Wyo., 23 Pac. Rep. 72.

34. FEDERAL COURTS— Federal Question. — Both the

parties to the suit being citizens of Louisiana, it cannot be removed unless there is some federal question involved. Conceding that the defendant's charter is a protected contract in the sense of the United States constitution, and that the ordinance sought to be enforced is such a law as may impair its obligation, yet the facts do not sustain such contention. — *State v. New Orleans, etc. R. Co.*, La., 7 South. Rep. 84.

35. FRAUDS — Statute of. — An agreement between a contractor, his subcontractor, and a third person, under which the contractor is to pay for all goods purchased of the third person by the subcontractor out of moneys to come into his hands for the latter, and receive a percentage on the amount, is not within the statute of frauds, as a collateral agreement to answer for the debt of another, but is an original promise, founded on a sufficient consideration.— *Ledbetter v. McGhees*, Ga., 10 S. E. Rep. 727.

36. FRAUDULENT CONVEYANCES—Evidence.—A deed by an insolvent debtor to a creditor, in consideration of a pre-existing debt and a promise by the grantee to pay a debt of the grantor to another creditor, the two debts being equal to the value of the property conveyed, is not in fraud of the rights of creditors, and especially when the grantee in fact pays the other creditor. — *Saunderson v. Broadwell*, Cal., 23 Pac. Rep. 36.

37. GARNISHMENT—Set-off.—Where defendant is in the employ of the garnishee under a contract for one year, but by agreement is allowed to draw his salary a week in advance, and the answer of the garnishee, giving a statement of the dates on which defendant drew his salary, shows that he did not always draw his salary in advance, but sometimes after it was earned, and that, too, since service of the garnishment, a charge that if the jury believe the evidence they must find for the garnishee is erroneous.—*Archer v. Whiting*, Ala., 7 South. Rep. 53.

38. GARNISHMENT—Municipal Corporations. — Where an incorporated town is summoned as garnishee on account of salary due one of its officers, the town may show in discharge of its liability that the officer is a collector of its taxes, and, as such, has received money of the town, which he insists upon retaining, equal to the amount of salary due him.—*Sauer v. Town of Nevadaville*, Colo., 23 Pac. Rep. 87.

39. GUARDIAN AND WARD — Accounting. — Where a guardian omits by mistake or inadvertence from his accounts filed in the probate court a small amount which he has collected for his ward, but it appears that such omission was not done with the intention of defrauding or injuring his ward, and the guardian gains no pecuniary advantage thereby, as the sum omitted is shown to have been used for the benefit of the ward: *Held*, that such omission establishes no actual or constructive fraud.—*Purslow v. Brune*, Kan., 23 Pac. Rep. 105.

40. HABEAS CORPUS — Procedure. — Under Pen. Code Cal. § 1487, providing that a party may be discharged where he has been committed on a criminal charge without reasonable or probable cause, it is competent for the court, on *habeas corpus*, though defendant is held under committment by a justice of the peace, and though an information has been filed against him, to go behind the warrant of commitment, and inquire into the question of reasonable or probable cause.—*Ex parte Sternes*, Cal., 23 Pac. Rep. 38.

41. HOMESTEAD—Subrogation.— Const. Ga. 1877, omitting the provision of Const. 1868, under which a homestead could be sold for money borrowed and expended in improvements on it, and expressly declaring that the improvements shall not be subject to levy and sale, the homestead cannot be sold for money used to improve it before the exemption was taken.— *McWilliams v. Bones*, Ga., 10 S. E. Rep. 724.

42. HUSBAND AND WIFE — Contracts of Wife.—A married woman is by the common law incapable of making a contract that will bind her personally, either in law or equity; and for this reason there cannot, in the absence of legislation changing the common law, be a judgment or decree against her personally for the recovery of money, as distinguished from a decree charging her separate equitable estate, or other property, with the payment of money. No exception to this rule is created by the existence of a marriage contract between husband and wife giving her the right to control and manage her separate estate and property the same as if she had remained unmarried. — *Prentiss v. Paisley*, Fla., 7 South. Rep. 56.

43. INJUNCTION—Contempt.— One not a party to a suit in which an injunction has issued, and to whom such injunction is not directed, cannot be held in contempt, or be punished for the violation of the writ, although the act prohibited be illegal in itself.—*Barthe v. Larquie*, La., 7 South. Rep. 80.

44. INSURANCE —Contract — Apportionment. — Where several policies are taken out in different companies, without any relation to each other, on the same property, they are independent contracts, and the policy in one company cannot be received in evidence to explain or vary what is contained in the other. — *Westinghouse, etc. Co. v. Western Assur. Co.*, La., 7 South. Rep. 73.

45. JUDGE—Disqualification — Affinity. — The interest which disqualifies a judge under § 28, p. 337, McClel. Dig., is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror. — *Ex parte Harris*, Fla., 7 South. Rep. 1.

46. JUDGMENT— Priority. — Where, by agreement between an insolvent debtor and his creditors, one of the latter is allowed to obtain judgment without delay, so that he may file a creditor's bill for the benefit of all the creditors, the judgment creditor has no priority over the others as to the assets reached by his bill.—*Talcott v. Grant Wire, etc. Co.*, Ill., 23 N. E. Rep. 402.

47. JUDGMENTS—Equitable Relief—Collateral Attack.— Where the defense to an action on a policy of fire insurance is that the title of the insured passed, before the fire, to a third person, who insured the same in his own name, and collected for the loss, the fact that such defense was rendered unavailable by the erroneous ruling of the court will not give a court of chancery jurisdiction to enjoin the collection of the judgment recovered in such action, since such defense is properly cognizable at law.— *Commercial, etc. Co. v. Scammon*, Ill., 23 N. E. Rep. 406.

48. JUSTICE OF THE PEACE— Larceny—Complaint.—An affidavit before a justice of the peace, charging that defendant stole, in the county of Montgomery, certain personal chattels from the premises of the complainant, setting forth the property, but averring neither the value nor ownership, was sufficient under Code Ala. §§ 4236, 4204, to give the justice jurisdiction so as to constitute his judgment the proper basis of appeal. — *Williams v. State*, Ala., 7 South. Rep. 101.

49. LANDLORD AND TENANT—Rent—Counterclaim.— In an action to recover rents due under a lease, a plea as a defense of false representations made by plaintiff as to the number of acres planted in certain crops is no defense, where defendant failed to plead such deficit as a counterclaim, or to aver damage by the false representations.—*Holton v. Noble*, Cal., 23 Pac. Rep. 58.

50. MALICIOUS PROSECUTION — Probable Cause.—In an action for damages for a malicious prosecution, an exception of no cause of action will be maintained if it appears from plaintiff's own petition, and from the judgment set up as his acquittal, that the prosecution was not actuated by malice or without probable cause. —*Barthe v. City of New Orleans*, La., 7 South. Rep. 71.

51. MALICIOUS PROSECUTION — Probable Cause. — The principle has been definitely and well settled that an action cannot be assimilated to and treated as a malicious prosecution, and the plaintiff therein held liable for exemplary damages, unless it discloses a want of probable cause.—*Ivers v. Ryan*, La., 7 South. Rep. 61.

52. MANDAMUS—Judicial Officers.—*Mandamus* does not lie to compel a district judge, who has affirmed a judgment sustaining a plea to the jurisdiction, to pass upon the merits of the controversy in the suit brought before

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the lower court. Such merits are not before him for review on an appeal from a judgment on the plea by the inferior tribunal. — *State v. King*, La., 7 South. Rep. 72.

53. MORTGAGES—Future indebtedness.—Where a mortgage is conditioned as security, in addition to the principal sum named, "for all further advances to the mortgagor by the mortgagee that may exist, arise or be contracted before the satisfaction hereof, a subsequent note, indorsed by the mortgagor, and by him transferred to the mortgagor is not secured by the terms of the mortgage.—*Morgan v. Gardemeyer*, Cal., 23 Pac. Rep. 6.

54. MORTGAGES—Sale under Power.—A sale by a mortgagee, under a power in the mortgage, to a third person for the mortgagee's benefit, is voidable upon suit brought within a reasonable time.—*Nichols v. Otto*, Ill., 23 N. E. Rep. 411.

55. MUNICIPAL CORPORATIONS. — Regulation. — The power of a municipal corporation to control the owners of property in the mode or manner of constructing their buildings, within certain designated limits, is not one of the incidental or implied powers which such corporations may exercise in the absence of express legislative authority.—*State v. Schuchardt*, La., 7 South. Rep. 67.

56. MUNICIPAL CORPORATIONS—Taxation.—A contract between a municipal corporation and a railroad company, by which the latter pays a bonus for the franchise therein conferred by the city, cannot be construed as conferring an immunity from the payment of a license on its business by the company, in the absence of an express stipulation to that effect in the contract.—*City of New Orleans v. Orleans R. Co.*, La., 7 South, Rep. 59.

57. MUNICIPAL CORPORATION—Indebtedness.—The city of New Orleans owes legal interest on claims against her, only where there is money in the municipal treasury out of which the same can be paid, and where, notwithstanding demand, she refuses to pay; particularly is such the case when it has been agreed that payments shall be made as soon as it may be properly ordinanced for.—*Fernandez v. City of New Orleans*, La., 7 South. Rep. 57.

58. MUNICIPAL CORPORATIONS—Defective Streets—Evidence that a hole in a bridge on one of the principal streets of a city was permitted to remain from 5 to 20 days is sufficient to charge the city with notice of its existence.—*City of Griffin v. Johnson*, Ga., 10 S. E. Rep. 719.

59. MUNICIPAL CORPORATIONS—Contracts.—A city ordinance, establishing a water board, provided that the board, should make no contract or purchase involving an expenditure of more than $10,000 without first advertising for bids. Afterwards the city council passed an order authorizing the board to exchange certain pumping-engines. *Held*, that an exchange made without advertising for bids, at an expenditure of more than $10,000, was not binding on the city, the order not abrogating the terms of the ordinance.—*Worthington v. City of Boston*, U. S. C. C. (Mass.), 41 Fed. Rep. 23.

60. MUNICIPAL CORPORATIONS—Debts.—A city charter authorized the city to establish a fire department, and to supply water for its use. The mayor and aldermen contracted for water for 30 years, at a stipulated sum per year: *Held*, that the collection of a special tax to pay the first years' installment cannot be enjoined, after the city has had the use of the water for a year, though the total amount of the annual payments under the contract exceeds the indebtedness which a city may incur under Const. Ga. art. 7, § 7.—*Ford v. City of Cartersville*, Ga., 10 S. E. Rep. 732.

61. MUTUAL BENEFIT INSURANCE. — Under St. Mass. 1882, ch. 195, (Pub. St. ch. 115.) which authorizes the formation of corporations "for the purpose of assisting the widows, orphans or other relations of deceased members, of any persons dependent upon deceased members," a mortuary certificate issued by such a corporation for the benefit of the member's "affianced wife," who was not dependent upon him for support, is payable to the member's next of kin, upon his dying before marriage.—*Palmer v. Welch*, Ill., 23 N. E. Rep. 412.

62. NEGLIGENCE— Independent Contractors.— A railroad company is not liable to a person injured through the negligence of a contractor or his servants engaged in constructing its road, where it appears that the contractor had the general control and direction of the manner of doing the work.—*Rome & D. R. Co. v. Chesteen*, Ala., 7 South. Rep. 94.

63. NEGOTIABLE INSTRUMENT—Attorney Fees.—Under Civil Code Cal., § 3088, which provides that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment," a promissory note containing a provision for 5 per cent. attorney's fees on the accrued principal and interest, in case suit should be brought for its enforcement, is not negotiable.—*Adams v. Seaman*, Cal., 23 Pac. Rep. 58.

64. PARTITION— Judgment.—A judgment rendered in a partition suit, in favor of plaintiffs, who are thereby correctly named, and against the only defendant therein, who is incorrectly named in part, is a valid and binding judgment against the party alleged to be coowner, and asked to be, and who was, cited.—*Succession of Corrigan*, La., 7 South. Rep. 74.

65. PARTNERSHIP—Accounting.—Where the report of referee in an action of accounting between partners shows that there is property in the hands of the defendant belonging to the firm undisposed of, it is error for the court to render a personal judgment for money only against the plaintiff before partnership affairs are fully settled, and the partnership property either divided or converted into cash. — *McGilleray v. Moser* Kan., 23 Pac. Rep. 96.

66. PARTNERSHIPS— Insolvency.— In insolvency proceedings to wind up the business of an insolvent commercial partnership, a partner *in commandum*, who claims to be a creditor of his copartner, does not occupy a different and better position than a full or active partner, and hence he cannot be allowed to enforce a pledge, granted to him by his copartner, on the latter's former share of the partnership property.—*Sherwood v. His Creditors*, La., 7 South. Rep. 79.

67. PLEADING—Sham Pleas.—It is the policy of the Code to suppress falsehood and secure truth in pleadings, and as one means of securing such result authority for striking out sham answers and defenses is given. —*Patrick v. McManus*, Colo., 23 Pac Rep. 90.

68. PLEDGE—Negligence of Pledgee.— When a party takes any property as a pledge for the security of a debt, which through his gross neglect is lost, he must bear the loss, and he must exercise ordinary care and diligence in all cases.—*Murphy v. Bartsch*, Ida., 23 Pac. Rep. 82.

69. POWER OF ATTORNEY.—A power of attorney to convey and sell, or to agree to convey and sell, land, is *prima facie* a power to sell for money; and, in the absence of evidence to the contrary, a tenant in common, who is so authorized by his co-tenant, but who, in his own name only agrees to convey, and afterwards does convey, a portion of the land, in consideration of the purchaser's boring an artesian well thereon, binds only himself, and not his co-tenant.—*Mora v. Murphy*, Cal., 23 Pac. Rep. 63.

70. PRACTICE—Service of Process.—Where a summons is issued by a justice of the peace and served by a constable, by leaving a true copy, with all the indorsements thernon, at the usual place of residence of the defendant, but no certificate is made by the officer that such copy is a true copy of the original summons, *held*, such omission renders such service voidable only, and not void.—*Friend v. Green*, Kan., 23 Pac. Rep. 93.

71. PRACTICE—Verdict against one Defendant.—In an action against three defendants, there was a verdict against one and in favor of another, but no reference was made to the third and no answer was filed by him: *Held*, that the omission to mention his name in the verdict, or to take judgment by default against him, was not a thing of which his co-defendant can complain.—

Golden Gate Mill & Min. Co. v. Joshua Hendy Machine Works, Cal., 23 Pac. Rep. 45.

72. PUBLIC SCHOOLS—Colored Children.—Under Pol. Code Cal. § 1662, providing that "every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age, residing in the district," etc., colored children have equal rights with white children to admission to any public school, and cannot be refused admission to the same school with white children, though separate schools have been established for each race.—*Wysinger v. Crookshank*, Cal., 22 Pac. Rep. 54.

73. RAILROAD COMPANY—Mechanics' Liens.—The word "laborer," as used in Sayles, Civil St. Tex. art. 3179*a*, means one who performs manual services in construction, repair, or operation contemplated by the statute, and does not embrace one who may work in preparing materials to be used in the construction of the road.—*St. Louis, etc. Ry. Co. v. Matthews*, Tex., 12 S. W. Rep. 976.

74. RAILROAD COMPANIES — Right of Way. — Where abutting or adjoining land-owners cultivate and occupy a part of the right of way granted by congress as an easement to a railway company, such possession must be regarded as permissive only, and not hostile or adverse, so as to confer title.—*Union Pac. Ry. Co. v. Kindred*, Kan., 23 Pac. Rep. 112.

75. RAILROAD COMPANIES—Negligence—Verdict.—It is competent for one of two railroad companies joined in an action for collision to ask for judgment over against its co-defendant in case judgment shall be rendered against it.—*Gulf, etc. Ry. Co. v. Hathaway*, Tex., 12 S. W. Rep. 999.

76. RAILROAD COMPANIES — Public Lands. — Where a railroad company fails to comply with the provisions of the act of congress granting the right of way to railroads through the public lands of the United States, the company has no right to run its road through the land of a homesteader who had complied with the terms of the homestead law, although the homesteader had not at the time received his patent from the government. *Savannah, etc. Ry. Co. v. Davis*, Fla., 7 South. Rep. 29.

77. RAILROAD COMPANY—Occupation of Street.—Under Code Iowa, § 464, the occupation of a street prior to the ascertainment and payment of the damages is a nuisance, and the rights of the abutter to enjoin the occupancy of the street by the purchaser of the railroad at a foreclosure sale is not merged in an unpaid judgment obtained against the railroad company for the damages.—*Harbach v. Des Moines, etc. Ry. Co.*, Iowa, 44 N. W. Rep. 348.

78. RAILROAD COMPANY—Negligence.—Question, upon the facts, as to negligence of engineer in running engine and injuring brakeman who was coupling cars.—*Neville v. Chicago, etc. Ry. Co.*, Iowa, 44 N. W. Rep. 367.

79. RAILROAD COMPANIES—Fires.—In an action against a railroad company for damages caused by fire, where the particular engine that is alleged to have set the fire is known and designated, evidence that another of defendant's engines set fire at another time and place is inadmissible.—*Ireland v. Cincinnati, etc. R. Co.*, Mich., 44 N. W. Rep. 426.

80. RAILROAD COMPANIES—Damages.—A railroad company is liable for damages to crops, resulting from its tearing down a fence, though it had purchased a right of way over the land from the landlord of the owner of the crops.—*Chattanooga, etc. R. Co. v. Brown*, Ga., 10 S. E. Rep. 730.

81. RAILROAD COMPANIES — Taxation. — A railroad bridge, not constructed as a part of the road, and used for general purpose of travel, is subject to local taxation, and the return of the bridge to the railroad assessors of the State as part of the road's mileage does not exempt it from such taxation as an independent structure. — *St. Joseph, etc. R. Co. v. Devereux*, U. S. C. C. (Kan.), 41 Fed. Rep. 14.

82. RAILROAD COMPANIES— Foreclosure— Receivers.—Where a railroad is in the hands of receivers pending suits of foreclosure and settlement of the priority of liens, it is proper, on the application of a lienholder claiming priority, to extend the receivership, as to such claim, over the portion of the road on which the priority is claimed. — *Mercantile, etc. Co. v. Missouri, etc. Ry. Co.*, U. S. C. C. (Kan.), 41 Fed. Rep. 8.

83. RAILROAD COMPANIES— Negligence.—One who voluntarily and unnecessarily halts his team near a railroad track, on which a freight train is standing, with knowledge that they are easily frightened at the noise of trains, cannot recover for personal injuries sustained by reason of the team's becoming unmanageable when the customary signals for starting the train were given. —*Hargis v. St. Louis, etc. Ry. Co.*, Tex., 12 S. W. Rep. 963.

84. REAL ESTATE BROKERS — Commissions. — In an action by real estate brokers for commission on a sale, where the question in dispute is whether plaintiffs had authority to sell at the price named, an entry in plaintiff's books of the price agreed on, made by them in defendant's presence, and at the time of their conversation with him, is admissible in evidence, though written in cipher.—*Monroe v. Snow*, Ill., 23 N. E. Rep. 401.

85. REMOVAL OF CAUSES— Practice. — Under the removal of causes of act the right of removal is determined on the face of the petition as matter of law. — *Guinault v. Louisville, etc. R. Co.*, La., 7 South. Rep. 62.

86. SALE—Representations. — Plaintiff's agent offered to sell defendant lumber for manufacturing purposes, and, being told that only dry lumber could be used, informed defendant that the grade known as "Star Poplar" would meet all requirements. Defendant thereafter wrote to plaintiff accepting the offer made by its agent, and ordering a certain quantity of "Star Poplar," giving no other description. It appeared that the grade known as "Star Poplar" might be either green or dry, and part of that shipped to defendant was green, which defendant refused to receive: *Held*, that plaintiff, having by letter to defendant ratified its agent's contract, was bound by such agent's representations.—*St. Louis, etc. Co. v. Vinton, etc. Co.*, Iowa, 44 N. W. Rep. 370.

87. SALE—Caveat Emptor—Warranty. — Plaintiff saw some wheat in defendants' store, and said that if he knew that it was spring wheat he would buy it for seed. He was told by the clerk that they were selling it for chicken feed, but they could find out if it was spring wheat. One of the proprietors then said he would write and inquire. Plaintiff asked once or twice if they had heard about the wheat, and was told they had not. Again he inquired, and the clerk said: "We have. It is spring wheat:" *Held*, that the representations of the clerk did not amount to an express warranty that it was spring wheat, and that the rule of *caveat emptor* applied.—*Kircher v. Conrad*, Mont., 23 Pac. Rep. 74.

88. SET-OFF—Promissory Notes.—A note that has been transferred by the payee cannot be set-off, in an action against him by the maker, though suit has been brought on the indorsement.—*Jenkins v. Neal*, Ark., 12 S. W. Rep. 1015.

89. SLANDER—Malice.—Where the agent of a corporation which is party to a suit, and is represented by counsel, remarks, during the trial, in reference to testimony given against the corporation, that "it is a lie," he does not thereby render himself liable for slander, unless malice is shown; such agent being entitled to the privilege of a party.— *Nissen v. Cramer*, N. Car., 10 S. E. Rep. 676.

90. SPECIFIC PERFORMANCE—Contract. — Specific performance of a contract to sell land, the price of which plaintiff was to pay in work, will not be enforced where the complaint fails to show how much work has been done, how much has been paid in that way, what is the balance due, or that there is any dispute on these points.—*Wakeham v. Barker*, Cal., 22 Pac. Rep. 1131.

91. STATUTES—Repeal. — As a rule, a statute without negative words will not repeal the particular provisions of a former one, unless the two are irreconcilably inconsistent.—*State v. Buckner*, La., 7 South. Rep. 65.

92. TAXATION—Swamp Lands. — The grant of the fed-

eral government to the State of Michigan, by Act Sept. 28, 1850, (9 U. S. St. at Large, 519,) to enable the State "to reclaim the swamp and overflowed lands therein," provided that "the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains:" *Held*, that it was discretionary with the State to determine how far the proceeds should be so applied, and that a purchaser of such land could not avail himself of the statute to claim exemption from drain taxes. — *A. P. Cook v. Auditor General*, Mich., 44 N. W. Rep. 420.

93. TENANTS IN COMMON. — A tenant in common who has been ousted of possession of the property by his co-tenant can recover his possession in trespass to try title.—*St. Louis, etc. Ry. Co. v. Prather*, Tex., 12 S. W. Rep. 969.

94. TENANTS IN COMMON—Boundaries.—A and B, being tenants in common of a section of land, agreed that A should have the south half, and B the north half. A deeded the southwest quarter, and by mistake located the upper boundary too far north. Her grantee deeded it to defendants without any reference to the northern boundary. B deeded the north half to plaintiff, calling for the proper southern boundary: *Held*, that plaintiff was not estopped from claiming the boundary line described in his deed.—*Carley v. Parton*, Tex., 12 S. W. Rep. 950.

95. TOWNSHIPS—Boundaries. — A dispute as to which township a private land claim is in cannot be settled by *mandamus* to compel the supervisor of one township to place the claim on his assessment roll; the two other townships interested in the controversy not being impleaded, and it appearing that relator's only reason for instituting the proceedings is to get a bridge built, which cannot be done on account of the dispute as to which township one end of it would be in. — *People v. Lindow*, Mich., 44 N. W. Rep. 414.

96. TRADE-MARK—Name.—A man may acqire the right of a trade-mark in his own name or the name of any person, but he cannot acquire the right of a trade-mark in the use of his own name or to the exclusion of the right of another person by the same name, and whose place of business is in the same place.—*El Modelo Cigar, etc. Co. v. Gato*, Fla., 7 South. Rep. 23.

97. TRIAL—Instructions.—An assignment of error because of unnecessary instructions, or that the instructions placed too prominently before the jury the law on any point, cannot be sustained when there is considerable evidence to support the theory or fact on which they were based.—*Murray v. White*, Cal., 23 Pac. Rep. 35.

98. TRIAL—Removal of Judge.—The trial of a cause having been commenced, and a portion of the evidence taken when the sitting judge was placed by the appointment of his successor, a question was raised by the defendant as to his right to require a trial *de novo*: *Held*, that the reintroduction of the testimony that was adduced before the judge *ex officio* was all the defendant could require.—*Brinkman v. Huyghe*, La., 7 South. Rep. 76.

99. TRIAL—Jury.—After the jury had returned their verdict, and defendant had demanded a poll, one of the jurors arose, and attempted to address the judge, but the record did not show whether the the judge saw or heard him. The jury was ordered to be polled; and, when his name was called, the juror, in response to the question, "Was this your verdict and is this your verdict?" twice answered, "Yes." The judge then discharged the jury. During these remarks the juror twice interrupted the judge, expressing his desire to say something: *Held*, that the refusal of the judge to hear the juror was not a ground for a new trial.—*Hughes v. Detroit, etc. Ry. Co.*, Mich., 44 N. W. 397.

100. TRIAL—Verdict— Coercing Jury.— Where a jury fails to agree, and the court, just before 12 o'clock on Saturday night tells them they must be kept together during the entire time from midnight till Monday morning, without discussing the verdict, and that they will be furnished their meals, but at their own expense, and the jury then retire, and in a few minutes return with a verdict, a new trial should be granted.—*Henderson v. Reynolds*, Ga., 10 S. E. Rep. 734.

101. TRUSTS— Interest of Beneficiary.—Under a conveyance of lands in trust "for the only proper use and benefit of the" beneficiary, "for and during the term of his natural life," the trustee "to hold said lands for the benefit of" the beneficiary "only, and to account to him or his guardian for the rents or yearly issues," the beneficiary's interest is assignable.—*Henson v. Wright*, Tenn., 12 S. W. Rep. 1835.

102. TRUSTS — Expenditures by Trustee. — Where a trustee has expended money in necessary repairs and improvements of the trust estate, and the outlay has been approved by the *cestui que trust*, he may hold the land on which the money was expended till the sum is repaid.— *Woodard v. Wright*, Cal., 22 Pac. Rep. 1118.

103. TRUSTEE AND CESTUI QUE TRUST—Fraud.—Where a beneficiary, in negotiating with her trustees for a settlement, renounces all confidence in them, and acts exclusively on the advice of her own personal friends and advisers, specially selected by her to make investigations, and counsel her, a contract of compromise entered into between her and the trustees, who during the investigation acted in good faith, and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skillful search.—*Colton v. Stanford*, Cal., 23 Pac. Rep. 16.

104. TRUSTEES — Burnt Records.—A deed conveying land in trust provided that the trustee might sell or improve the same, "provided there shall be no lien, incumbrance, or charge created thereby on said premises." The record of the deed was afterwards destroyed by fire: *Held*, that the operation of the record as notice was not thereby affected, and that the land could not be charged with a mechanic's lien by virtue of any contract made by the trustee.—*Franklin Sav. Bank v. Taylor*, Ill., 23 N. E. Rep. 397.

105. VENDOR AND VENDEE — Subrogation.— W and M purchased land, each agreeing to pay one-half of the consideration. When the deed to them was delivered, M was unable to pay his share, and W paid the whole amount. Afterwards a note was made by M and indorsed by W to enable him to realize the amount paid, and W had the note discounted, and received the proceeds. It was renewed several times, and was partially paid from the rents of the property: *Held*, that as W was not a surety for M, and as a vendor's lien was not reserved, W was not entitled to be subrogated to the rights of a vendor to a lien upon M's interest in the land.— *Walsh v. McBride*, Md., 19 Atl. Rep. 4.

106. WILL—Devise—Dower.—Under Rev. St. Ill. ch. 41, § 10, which provides that any devise of land or estate therein to a wife bars her right of dower, a will giving testator's widow one-third of the net income of his land bars her dower.—*Stunz v. Stunz*, Ill., 23 N. E. Rep. 407.

107. WILLS—Revocation.—A subsequent will, showing by its whole tenor that it was intended to contain all the testamentary dispositions of the deceased, revokes a prior will, in so far as it contains dispositions incompatible with those contained in the will last made. — *Succession of Bobb*, La., 7 South. Rep. 60.

108. WILLS—Election by Legatee.—A testator devised a portion of his estate to defendant, his son, and directed him to convey certain land in Iowa to testator's widow for life, remainder to M. Defendant accepted the devise to him: *Held*, that assuming the land in Iowa belonged to him, he thereby elected to surrender all right to it, and to make the conveyance directed.— *McQuerry v. Gilleland*, Ky., 12 S. W. Rep. 1037.

109. WITNESS—Competency.—A child, seven and one-half years of age, is a competent witness, where it appears, on her examination by the judge, that she has an intelligent comprehension of the belief that falsehood is not only morally wrong, but will be severely punished in the future.—*McGuff v. State*, Ala., 7 South. Rep. 35.

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